IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
1:07cv231

C. BURGESS,	)	
	)	
Plaintiff,	)	
	)	
Vs.	)	**MEMORANDUM AND**
	)	**RECOMMENDATION**
EFORCE MEDIA, INC.; WIZARD HOLDING, INC.; ADKNOWLEDGE, INC.; BASEBALL EXPRESS, INC.; ALLEN-EDMONDS SHOE CORPORATION; INTERSEARCH GROUP, INC.; TRUSCO MANUFACTURING COMPANY; PRICEGRABBER.COM, INC.; SHOPZILLA, INC.; DAZADI, INC.; and SIX THREE ZERO ENTERPRISES, LLC,	)	
	)	
Defendants.	)	
________________________________	)	

THIS MATTER is before the court on Allen-Edmonds Show Corporation's Motion to Dismiss (#27). On July 26, 2007, this court advised plaintiff, who is proceeding *pro se*, in accordance with Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), that he had the right to respond to such defendant's motion and plaintiff with a deadline of August 9, 2007, for filing

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any such response. At the close of business on August 8, 2007, plaintiff filed with this court a Motion for Extension of Time (#32), therein making allegations that defendants had failed to comply with Rule 5(a), Federal Rules of Civil Procedure, by not providing him with certain documents and seeking an additional 30 days within which to respond. On August 9, 2007, defendant Allen Edmonds Shoe Corporation responded (#33), and therein showed to the satisfaction of the court that plaintiff's motion for extension was based on inaccurate representations. Based on such representations and the attachments to such showing this court agrees, and will deny the request for an extension.

Now pending before the court are the following dispositive motions:

(1) Adknowledge, Inc.'s Motion to Dismiss (#19);

(2) Eforce Media, Inc.'s Motion to Dismiss (#21);

(3) Iwizard holding, Inc.'s Motion to Dismiss (#24); and

(4) Allen Edmonds Shoe Corporations's Motion to Dismiss (#27).

Non-dispositive motions that are pending include the following:

(1) plaintiff's Motion for Reconsideration (#31); and

(2) plaintiff's Motion for Extension of Time to File Response to Motion to Dismiss (#32).

As indicated by the court's docket, the time for responding to all dispositive motions has now passed, and this court is not inclined to enlarge any such deadlines inasmuch as plaintiff has not made accurate representations to this court.

With or without a response from plaintiff, it appears for the reasons discussed herein that, with the exception of one tort claim discussed infra, all defendants are entitled to the relief they seek as a matter of law, inasmuch as plaintiff lacks standing to bring Count One of the Complaint and because Count Two of the Complaint fails to assert claims recognized by North Carolina law, with one exception.

FINDINGS AND CONCLUSIONS

I. Motion to Dismiss under Rule 12(b)(6): Applicable Standard

Where a defendant contends that a plaintiff has failed to state a cognizable claim, Rule 12(b)(6) authorizes dismissal based on a dispositive issue of law. Neitzke v. Williams, 490 U.S. 319, 109 S.Ct. 1827, 1832 (1989); Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Conley v. Gibson, 355 U.S. 41 (1957). As the Court discussed in Neitzke:

> This procedure [for dismissal], operating on the assumption that the

> factual allegations in the complaint are true, streamlines litigation by dispensing with needless discovery and fact finding. Nothing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable. On the contrary, if as a matter of law "it is clear that no relief could be granted under any set of facts . . . a claim must be dismissed, without regard to whether it is based on outlandish legal theory . . . . What Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations."

Id., at 1832 (citation omitted). Dismissal of a complaint is proper under Rule 12(b)(6) where it is clear that no set of facts consistent with the allegations in the plaintiffs' complaint could support the asserted claim for relief. Taubman Realty Group LLP v. Mineta, 320 F. 3d 475, 479 (4th Cir. 2003); Migdal v. Rowe Price-Fleming Intl Inc., 248 F. 3d 321, 325-36 (4th Cir. 2001).

While the court accepts factual allegations in the complaint as true and considers the facts in the light most favorable to a plaintiff in ruling on a motion to dismiss, a court "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." Eastern Shore Mkt.'s Inc. v. J.D. Assoc.'s, LLP, 213 F. 3d 175, 180 (4th Cir. 2000).

> The presence of a few conclusory legal terms does not insulate a complaint from dismissal under Rule 12(b)(6) when the facts alleged in the complaint cannot support the legal conclusion. And although the pleading requirements of Rule 8(a) are very

> liberal, more detail often is required than the bald statement by plaintiff that he has a valid claim of some type against defendant. This requirement serves to prevent costly discovery on claims with no underlying factual or legal basis.

Migdal, at 326 (citations and internal quotations omitted). In addition, a court cannot "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit." Venev v. Wyche, 293 F. 3d 726, 730 (4th Cir. 2002) (citations and internal quotations omitted). For the limited purpose of ruling on defendants' motions, the court has accepted as true the facts alleged by plaintiff in the complaint and will view them in a light most favorable to plaintiff.

II. Discussion

A. Existence of a Dispositive Issue of Law

In this action, plaintiff contends that defendants' pop-ups, spam, advertisements, spyware, worms, and viruses, have damaged the performance of the internet browser of his personal computer and seeks damages, punitive damages, and other relief. In moving to dismiss, defendants have shown that plaintiff lacks standing to bring Count One and that in Count Two he has failed, with one exception, to state any claim as a matter of state law.

B. Plaintiff's Claims

In Count One of the Complaint, plaintiff attempts to assert a cause of action against a number of the defendants under the CAN-SPAM Act of 2003, codified as 15, United States Code, Sections 7701-7713. This claim is based on his receipt of unwanted and unsolicited emails.

In Count Two, plaintiff claims that other defendants have unlawfully caused to be placed on his personal computer a worm or virus, that defendants have derived a benefit from such act, and that such worm or virus causes damage to his internet browser to the point that the browser becomes non-functional. Plaintiff has couched this claim in terms of invasion of privacy, trespass to chattels, and that the conduct is "illegal." Plaintiff has made no claim that such alleged acts have caused damage to his computer hardware.

C. Count One: Lack of Standing

Count One is not based on placing viruses or worms on plaintiff's computer; instead, it appears that plaintiff is contending in this count that the defendants name in such counts sent him unsolicited and unwanted email messages, also known as Spam. While all internet users, including this court, are frustrated by unwanted and unwelcomed emails, and viruses, the end internet user has no legal recourse for such frustration. Instead, our remedies are found in Spam blockers, which of course are not always effective.

Plaintiff, who does not allege that he is an internet access service provider, attempts to bring a cause of action under the CAN-SPAM Act. The CAN-SPAM Act's enforcement provisions empower the Federal Trade Commission and other federal agencies to pursue violations of the act, and provides a private cause of action only to providers of Internet access service. As courts interpreting the Act have held:

> Because Defendants challenge Plaintiffs' standing to bring a private cause of action under CAN-SPAM, the Court must address this threshold issue prior to reaching the merits of their CAN-SPAM claims. The CAN-SPAM Act's primary enforcement provisions empower the Federal Trade Commission "FTC" and other federal agencies to pursue violators of the Act. 15 U.S.C. § 7706(a), (b). State attorneys general may bring civil enforcement actions. Id. § 7706(f). A limited private right of action also exists. The CAN-SPAM Act allows an action by a "provider of Internet access service adversely affected by a violation of" §§ 7704(a)(1), 7704(b), or 7704(d) or "a pattern or practice that violates" § 7704(a)(2), (3), (4), or (5).

Gordon v. Virtumundo, Inc., 2007 WL 1459395, *2 (W.D.Wash. 2007)(footnotes omitted).

It is well settled that "a determination that the plaintiff lacks standing deprives a court of Article III jurisdiction, and that where jurisdiction ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Rosenfeld v. Montgomery County Public Schools, 2001 WL 1658893, **5 (4th Cir. 2001)(citations and corresponding quotation marks removed). In this case, plaintiff's lacks standing to assert any claim under the CAN-SPAM Act, and this court in turn lacks jurisdiction over any such claim, and the undersigned will recommend that such claim be dismissed.

D. Count Two: Preemption and Failure to State a Claim

In Count Two, plaintiff contends that another grouping of defendants unlawfully caused to be placed on his personal computer a worm or virus, that defendants have derived a benefit from such act, and that such worm or virus causes damage to his internet browser to the point that the browser becomes non-functional. Plaintiff has couched this claim in terms of invasion of privacy, trespass to chattels, and that the conduct is "illegal." Plaintiff has made no claim that such alleged acts have caused damage to his computer hardware. Defendants contend that this cause of action should be dismissed under two theories: first, that it is preempted by the CAN-SPAM Act; and second, that plaintiff has failed to state a claim.

1. Preemption

While some parties appear to argue that the CAN-SPAM Act preempts Count Two, see Docket Entry 22, at p. 2, this claim appears to based on the common law for trespass to chattels and invasion of privacy.

Although defendants have accurately portrayed Section 7707(b)(1) of the Act as specifically superceding any "statute, regulation, or rule" of any state, id., they have apparently overlooked Section 7707(b)(2)(A), which excludes from preemption, *inter alia*, "State laws that are not specific to electronic mail, including State trespass, contract, or tort law . . . ." Id. Thus, it does not appear that the CAN-SPAM Act would preempt plaintiff's Second Cause of Action.

2. Failure to State a Cause of Action

Reading Count Two in a light most favorable to plaintiff, it would appear that he has attempted to allege three torts in one claim: (1) invasion of privacy; (2) trespass; and (3) "illegal conduct." For purposes of clarity and to afford plaintiff maximum review, the undersigned will discuss the motions to dismiss as if three claims were in fact made.

(a) Invasion of Privacy

Plaintiff appears to allege that by placing spyware, worms, or viruses on his computer, defendants have invaded his right to privacy. Reviewing such pleading in a light most favorable to plaintiff, it is possible that he is attempting to assert a cause of action for invasion of privacy through "intrusion." The North Carolina courts provide guidance as to such a claim:

> Generally, there must be a physical or sensory intrusion or an unauthorized prying into confidential personal records to support a claim for invasion of privacy by intrusion. We have held that " 'intrusion' as an invasion of privacy is [a tort that] ... does not depend upon any publicity given a plaintiff or his affairs but generally consists of an intentional physical or sensory interference with, or prying into, a person's solitude or seclusion or his private affairs." Specific examples of intrusion include "physically invading a person's home or other private place, eavesdropping by wiretapping or microphones, peering through windows, persistent telephoning, unauthorized prying into a bank account, and opening personal mail of another." The conduct required to support this claim must be so egregious as to be "highly offensive to a reasonable person."

Broughton v. McClatchy Newspapers, Inc., 161 N.C.App. 20, 29 (2003). Even if what plaintiff has alleged did occur, it simply is not "so egregious" as to be highly offensive to a reasonable person. In fact, plaintiff makes no allegations that fit within the strictures of Broughton. Instead, it is plaintiff's contention, among others, that these worms or viruses simply cause redirection of searches:

> The Plaintiff will type a search word in his Google tool bar. He will then click on the first site shown by Google or any site shown by

> Google and instead of going to that site is [*sic*] redirected or "Jumps" to a site promoted by the Defendants. . . .When the Plaintiff attempts to click on a non commercial site, the Browser shows that there is no access to the Internet.

Complaint, at ¶ 41. (Docket Entry 1, Ex. A). While the undersigned shares in plaintiff's frustration with the internet and the unconscionable applications that interfere with one's use and enjoyment of technology - - and at times display offensive websites - - frustration of purpose is not an invasion of privacy. Further, the undersigned cannot find any North Carolina case recognizing a cause of action for invasion of privacy based on computer viruses that redirect internet searches or inquiries, or any cases that would suggest that similar such conduct in other fields would support such a claim. The Court of Appeals for the Fourth Circuit, applying Oklahoma law, has specifically advised that "[w]e proceed with caution in this area because Oklahoma courts appear never to have recognized this tort based upon intangible invasions of computer resources." Omega World Travel, Inc. v. Mummagraphics, Inc., 469 F.3d 348, 359 (4th Cir. 2006).The undersigned will, therefore, recommend that plaintiff's invasion of privacy claim be dismissed with prejudice

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(b) Trespass to Chattels

The essential elements of a claim for civil trespass to personal property, otherwise known as trespass to chattels, are discussed by the North Carolina Supreme Court in Fordham v. Eason, 351 N.C. 151 (1999):

> The basis of a trespass to chattel cause of action lies in "injury to possession." Motley v. Thompson, 259 N.C. 612, 618, 131 S.E.2d 447, 452 (1963). A successful action for trespass to chattel requires the party bringing the action to demonstrate that she had either actual or constructive possession of the personalty or goods in question at the time of the trespass, see White v. Morris, 8 N.C. 301, 303 (1821); Carson v. Noblet, 4 N.C. 136 (1814), and that there was an unauthorized, unlawful interference or dispossession of the property, see Binder v. General Motors Acceptance Corp., 222 N.C. 512, 515, 23 S.E.2d 894, 896 (1943); Kirkpatrick v. Crutchfield, 178 N.C. 348, 350, 100 S.E. 602, 604 (1919); Reader v. Moody, 48 N.C. 372, 373-74 (1856).

Id., at 155.

The undersigned is aware of at least one case in which a federal court found a cause of action to be stated for trespass to chattels under Illinois law where plaintiff alleged that spyware was the proximate cause of significant and cumulative injury to his computer as well as those of others. See Sotelo v. DirectRevenue, LLC, 384 F.Supp.2d 1219 (N.D.Ill. 2005).

Consistent with Sotelo, there is a recent published decision directly on point from North Carolina's Business Court.[1] Not only is the case directly on point and favorable to plaintiff, it is plaintiff's case. In Burgess v. American Express Co., Inc., 2007 NCBC 15, *2-3, 2007 WL 1581439 (N.C.B.C. May 21, 2007), the Superior Court found, as follows:

> Moreover, while Burgess's Amended Complaint is perhaps not a model pleading, the Court discerns at least one viable claim under North Carolina state law, trespass to chattels.
>
> Burgess's claim is premised on the appearance of unauthorized "pop-up" messages on his computer displaying the Defendants' advertisements. Burgess alleges specifically that Target (and other Defendants), through the services of a third-party intermediary, delivered unauthorized "pop-up" advertisements to his computer and thereby caused damage to the same. (Am. Compl. 26-30, 34, 43, 45.)
>
> Construing these allegations in the light most favorable to Burgess, he has at least alleged a claim for trespass to chattels under North Carolina common law, the elements of which are:
>
> (1) the plaintiff had either actual or constructive possession of the personalty or goods in question at the time of the trespass; and (2) there was an unauthorized, unlawful interference or dispossession of the property. See Fordham v. Eason, 351 N.C. 151, 155, 521 S.E.2d 701, 704 (1999); see also Sotelo v. DirectRevenue, LLC, 384 F. Supp. 2d 1219, 1229-30 (N.D.Ill.2005) (recognizing

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[1] The undersigned notes that counsel for defendants Eforce Media, Inc., and Adknowledge, Inc., was counsel for the moving defendant in Burgess v. American Express, supra, and had actual knowledge of such decision. Such attorney had, however, no obligation to reveal the existence of such decision inasmuch as those defendants were not named in Count Two.

Inasmuch as defendant Allen Edmonds Shoe Corporation properly cited the court to the adverse authority in Sotelo, the undersigned assumes that such defendant was unaware of Burgess even though Burgess could have been found through a Westlaw' Key Cite of Sotelo..

> tort of trespass to chattels under Illinois common law for transmission of unauthorized "pop-up" advertisements to a plaintiff's computer).
>
> The Court is also satisfied that Burgess has alleged actual harm; although, I note that actual damage is not required to pursue a claim for trespass to chattels in North Carolina, at least where the claim is based on unlawful interference. Hawkins v. Hawkins, 101 N.C.App. 529, 533, 400 S.E.2d 472, 475 (1991).

Id. Thus, it appears that the common law of North Carolina would recognize a claim for trespass to chattels based on allegations that are substantially similar to those made in this Complaint. The undersigned will recommend that the motions to dismiss of the respective defendants be denied as to plaintiff's claim for trespass to chattels.

(c) "Illegal Conduct"

Finally, plaintiff has alleged in Count Two that the alleged conduct of the named defendants in placing such viruses or worms on his computer was "illegal." There simply is no cause of action recognized at the common law for "illegal conduct," and the undersigned will recommend that any such claim be dismissed.

III. Non-Dispositive Motions

A. Introduction

Plaintiff has also filed two non-dispositive motions which touch upon the dispositive motions filed by defendants. Plaintiff has moved for reconsideration of the district court Order striking his attempt to unilaterally dismiss this entire action after one of the defendant's had answered. Motion for Reconsideration (#31). Plaintiff has also moved to extend the time to respond to defendants' motions to dismiss based on representations which have been shown to be inaccurate. Motion for Extension of Time to File Response to Motion to Dismiss (#32).

B. Motion to Reconsider

Plaintiff argues that under Rule 41(a)(1) he has the right to unilaterally dismiss all defendants other than the defendant who answered. In relevant part, Rule 41(a)(1) provides as follows:

> Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of

> dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

Fed.R.Civ.P. 41(a)(1).

The rule allows plaintiffs two avenues for voluntary dismissal without a court Order. First, defendant can dismiss his action at any time before the defendant has answered. Where defendant has answered, plaintiff may still dismiss the action without court order where he obtains on his stipulation of dismissal the signature of all parties who have appeared. Thus, the rule, in using "answered" in subsection (i) and "appeared" in subsection (ii) clearly anticipates that a plaintiff could unilaterally dismiss an action where defendants have only filed motions to dismiss (or not appeared in any manner), but requires the signatures of all defendants that have "appeared" when any answer is filed. Those who have made an appearance in a case is much broader than the subset of those who have "answered": the term "appearance" who include those who have answered, those who have moved to dismiss, or those who have many any other general "appearance," which would include the multitude of defendants herein who moved for extensions of time to answer or otherwise plead. "[T]he general rule in civil actions is now (and has been for some time) that any appearance in an action is a general appearance, *e.g.*, Grammenos v. Lemos, 457 F.2d 1067, 1070 (2d Cir.1972); Bjorgo v. Weerden, 342 F.2d 558, 560 (7th Cir.1965), Orange Theatre Corp. v. Rayherstz Amusement Corp., 139 F.2d 871, 874 (3d Cir.) (*en banc*), *cert. denied*, 322 U.S. 740, 64 S.Ct. 1057, 88 L.Ed. 1573 (1944) . . . ." United States v. Republic Marine, Inc., 829 F.2d 1399, 1402 (7th Cir. 1987). While special appearances may still be made in admiralty and criminal proceedings, Rule 12(h)(1) "has abolished the distinction between general and special appearances for virtually all suits brought under those rules [the Federal Rules of Civil Procedure] . . . ." Id., at f.n. 2. (This is because Rule 12(h)(1) specifically sets forth the method for challenging personal jurisdiction.)

When Rule 41(a)(1) rule is read closely, once Pricegrabber.com, Inc., filed its Answer on July 2, 2007, any voluntary dismissal to be effective had to include the signatures of not only Pricegrabber.com, Inc., but of all defendants who had "appeared,' which by July 2, 2007, included all defendants since all defendants had moved to enlarge the time to answer or otherwise respond.

On July 6, 2007, plaintiff filed his "Dismissal Without Prejudice." By that date, defendant Pricegrabber.com, Inc., had filed its Answer on July 2, 2007, and all other defendants had moved for enlargement of time to answer or otherwise respond. Only plaintiff signed the July 6, 2007, dismissal, making it ineffective. To save the district court time in review the undersigned has attempted to examine the contentions of the plaintiff and as a result would respectfully recommend the district court reaffirm such Order.

Plaintiff's motion for reconsideration has, however, given this court reason to examine the plaintiff's July 19, 2007, Stipulation of Dismissal (#26), and July 24, 2007, Stipulation of Dismissal (#29), which were signed only by plaintiff and counsel for Pricegrabber.com, Inc., and counsel for Shopzilla, Inc., respectively. Such dismissals are defective for two reasons: (1) first, they do not contain the signatures of the other defendants who had appeared by such date, a violation of Rule 41(a)(1); and (2) they attempts to dismiss less that the entire action, a violation of the clear language of the Rule and the established precedence of this court. Specifically, the district court held in Gahagan v. North Carolina Hwy. Patrol, 1:00cv52 (W.D.N.C. Oct. 25, 2000):

Rule 41 . . . speaks only to the dismissal of "actions." Plaintiff does

> not seek, at this juncture, to dismiss the entire action; rather, as stated *supra*, he wishes to dismiss certain claims within this action . . . . Rather than a Rule 41 dismissal, the Plaintiff should seek to amend his complaint by meeting the requirements of Rule 15. "A plaintiff wishing to eliminate particular claims or issues from the action should amend the complaint under Rule 15(a) rather than dismiss under Rule 41(a)." *Moore's Federal Practice 3d*, § 41,21[2] (citing Skinner v. First Am. Bank of Virginia, 64 F.3d 659 (table), 1995 WL 507264 (4th Cir. 1995).

Id. The decision in Gahagan is, respectfully, wholly consistent with Rule 41(a)(1), which speaks only to dismissal of actions, not claims and not defendants. This court certainly has no problem with plaintiff and all defendants dismissing this action; however, Rule 41(a)(1) is not the tool for winnowing away at claims that might no longer be meritorious and parties with whom settlement is reached. By requiring amendment of the Complaint to reflect active claims and active defendants, the court as well as the public can remain aware of the charges plaintiff is making. Further, the Complaint, if read to jury, must accurately reflect the claims and the parties in order to avoid confusion.

Having considered plaintiff's motion, and it appearing that the first Voluntary Dismissal was properly stricken, the undersigned will respectfully recommend that the district court reaffirm such Order as it does not appear to be contrary to law. The undersigned will further recommend to the district court that it consider striking the second Voluntary Dismissal (#26) and the third Voluntary Dismissal (#29) for failure to comply with Rule 41(a)(1) or the precedent of this court.

C. Motion for Extension of Time

Plaintiff's request for a 30 day extension of time to respond to the motions to dismiss appears to be based on the premise that he did not receive documents from various parties and email discussions he had with various parties. Review of the correspondence attached to the response to such motion indicates that the reasons given by plaintiff are not accurate.

In light of the above recommendations concerning the motions to dismiss, it appears that a response from plaintiff is unnecessary inasmuch as Count One is barred as a matter of law and Count Two appears to survive as a claim for trespass to chattels.

The undersigned will recommend that such motion be denied.

RECOMMENDATION

IT IS, THEREFORE, RESPECTFULLY RECOMMENDED that

(1) Adknowledge, Inc.'s Motion to Dismiss (#19) be **ALLOWED**, that

Count One be **DISMISSED** with prejudice in accordance with Rule 12(b)(6), and such defendant be **DISMISSED** from this action ;

(2) Eforce Media, Inc.'s Motion to Dismiss (#21) be **ALLOWED**, that Count One be **DISMISSED** with prejudice in accordance with Rule 12(b)(6), and such defendant be **DISMISSED** from this action;

(3) Iwizard Holding, Inc.'s Motion to Dismiss (#24) be **ALLOWED,** and that Count One be **DISMISSED** with prejudice in accordance with Rule 12(b)(6), and such defendant be **DISMISSED** from this action ;

(4) Allen Edmonds Shoe Corporations's Motion to Dismiss (#27) be **ALLOWED** in part and **DENIED** in part as follows:

(a) that the Motion to Dismiss Count Two be **ALLOWED** insofar as plaintiff has attempted to allege claims for invasion of privacy or for "illegal acts," and that such specific claims be **DISMISSED WITH PREJUDICE**; and

(b) that the Motion to Dismiss Count Two be **DENIED** insofar as plaintiff has alleged a trespass to chattels;

(5) plaintiff's Motion for Reconsideration (#31) be **DENIED**, and it appearing that the first Voluntary Dismissal was properly stricken, the undersigned will recommend that the district court reaffirm such Order as it does not appear to be contrary to law.

(6) The undersigned further **RECOMMENDS** that the second Voluntary Dismissal (#26) and the third Voluntary Dismissal (#29) be **STRICKEN** for failure to comply with Rule 41(a)(1) or the precedent of this court; and

(2) plaintiff's Motion for Extension of Time to File Response to Motion to Dismiss (#32) be **DENIED.**

The parties are hereby advised that, pursuant to 28, United States Code, Section 636(b)(1)(C), written objections to the findings of fact, conclusions of law, and recommendation contained herein must be filed within **fourteen** (**14**) days of service of same. Failure to file objections to this Memorandum and Recommendation with the district court will preclude the parties from raising such objections on appeal. Thomas v. Arn, 474 U.S. 140 (1985), reh'g denied, 474 U.S. 1111 (1986); United States v. Schronce, 727 F.2d 91 (4th Cir.), cert.

denied, 467 U.S. 1208 (1984).

Signed: August 12, 2007

Dennis L. Howell
United States Magistrate Judge